Supreme Court, U.S.
FILED
JUN 21 2006
OFFICE OF THE CLERK

No. 05-1641

IN THE

Supreme Court of the United States

BERRELL FREEMAN,
Petitioner,

v.

GERALD A. BERGE, *et al.*,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that food deprivation resulting from an inmate's refusal to follow various prison regulations does not constitute punishment within the meaning of the Eighth Amendment, even where the deprivation included at least two periods lasting eight or more consecutive days?

2. Whether the court of appeals erred by failing to draw all reasonable inferences in petitioner's favor in reviewing the district court's grant of the prison officials' post-trial motion for judgment as a matter of law?

3. Whether the court of appeals erred in applying the objective component of the deliberate indifference test as set out by this Court?

4. Whether prison officials may withhold all food from an inmate under any circumstances and, if so, for how long?

PARTIES TO THE PROCEEDING

Petitioner is Berrell Freeman.

Respondents are Gerald A. Berge, Peter Huibregtse, Brad Hompe, Gary Boughton and John Sharpe.[1]

[1] John Sharpe and Gary Boughton were included on the list of appellees in the caption of this case before the United States Court of Appeals for the Seventh Circuit and, as such, are included here as respondents pursuant to Supreme Court Rule 12.6. However, John Sharpe was voluntarily dismissed before trial and the jury did not find Gary Boughton liable. Petitioner has not sought, and does not here seek, review of any judgment relating to Mr. Boughton or Mr. Sharpe.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Berrell Freeman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 441 F.3d 543 (Pet. App. 1a). The district court's opinion and order is reported at 2005 WL 1168311 (Pet. App. 8a).

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Berrell Freeman is a prison inmate who, at all times during these proceedings, has been incarcerated by and in the custody of the Wisconsin Department of Corrections (DOC) at the Wisconsin Secure Program Facility ("WSPF") (a facility formerly known as "Supermax") in Boscobel, Wisconsin. Freeman brought suit under 42 U.S.C. § 1983 against Gerald Berge, the Warden at WSPF during the period relevant to this case, Peter Huibregtse, the Deputy Warden at WSPF, and Brad Hompe, the Unit Manager responsible for Freeman's unit. Pet. App. 10a. Freeman alleged violations of his Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 11a. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

Although several of Freeman's initial claims were dismissed, Freeman was permitted to go to trial on his claim that defendants had punished him for violations of various prison rules by withholding his meals for days, and in some cases, weeks at a time. Pet. App. 11a. At trial, Freeman presented evidence that he had been denied meals on hundreds of occasions over a period of about 27 months because he had refused to put shorts or trousers over his underwear or turn on his light in accordance with the prison's meal delivery policy, had worn a sock around his head, refused to clean his cell or slept through announcement of a meal. *Id.* Freeman missed meals for three days in April 2001; he missed approximately 242 meals between July 6, 2001 and November 3, 2001; he missed all meals for two consecutive days in April 2002; he missed meals for at least eight consecutive days in June through early July 2002; he missed meals for several consecutive days in February 2003; he missed meals for three consecutive

days in March 2003; he received only his breakfast meal each day from May 18 until June 5, 2003; he missed all meals for two periods in September 2003, one lasting two days and one lasting four; and he missed all meals for at least eight straight days during October 2003. *Id.*

Freeman testified that, as a result of officials' withholding his meals, he lost between 40 and 50 pounds. He began experiencing massive headaches, shortness of breath, dizziness, muscle weakness, bone pain and difficulty defecating. Pet. App. 11a; Tr. 1 A 61-62, Tr. 1 B 11:1-9. Freeman testified that "[e]verything you taste gets messed up and stuff starts smelling funny," and that the muscle weakness became so acute that he requested to have his mattress on the floor so that he did not have to stand up. Tr. 1 A 61:7-10. Freeman also told the jury that he coughed up blood and began seeing and hearing things. Tr. 1 A 61-62.

Freeman testified that he did not refuse his meals; in all instances, he wanted to eat, but was denied his meal. Tr. 1 A 40:18-19. Freeman complained to prison officials of his situation on a number of occasions, but his complaints were dismissed or ignored. Tr. 2 A 11-12, Tr. 2 A 14, Tr. 2 A 16-17.

The prison had a "hunger strike" policy requiring that health services be notified if an inmate missed nine consecutive meals. Tr. 1 B 72-73. Although Freeman testified that he missed meals for at least eight consecutive days in July 2002, there was no evidence that the prison's policy was put into action at that time. With regard to the other eight-consecutive day period, there was no evidence that anyone saw Freeman until he had missed at least fourteen consecutive meals and even then, he was not seen by a doctor and was not provided with food. Tr. 4 B 48.

A jury found Berge, Huibregtse and Hompe liable for their deliberate indifference to a substantial risk of serious harm placed upon Mr. Freeman while in their custody. Pet. App. 11a-12a, 19a-20a. The jury awarded Freeman $50,000 in compensatory damages and $400,000 in punitive damages against each of the three defendants. *Id.* at 12a, 21a-22a.

After trial, Berge, Huibregtse and Hompe renewed their motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(b) and moved, in the alternative, for a new trial or a remittitur of the compensatory damages in the amount of $25,000. Pet. App. 12a. The district court granted defendants' motion, overturning the jury's verdict against each of the three defendants on the basis of the Seventh Circuit's decision in *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005) and because the trial evidence "f[ell] short of establishing that plaintiff's course of conduct and defendants' response subjected plaintiff to a substantial risk of serious harm." Pet. App. 17a.[2] The court noted that Freeman "never reached the point of organ failure or came close to it" and "[t]here

[2] In granting the Rule 50 motion, the district court misconstrued Freeman's claim to be, at least in part, a facial challenge to the prison meal rule and, on that basis, held that judgment as a matter of law was appropriate on the basis of *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005). Pet. App. 16a ("In light of the decision in *Rodriguez*, it is clear that this facial challenge to the policy is untenable."). However, Freeman's allegations raised only an as-applied challenge to the WSPF policy, challenging the extent and duration of the deprivation, which was properly considered and decided by the jury. Pet. App. 19a-20a, 24a-25a; *see also* Tr. 1 A 6 (wherein the district court stated its understanding of the issue before the jury: "The jury is going to decide whether in this situation, in this set of facts, it was legal or illegal for the defendants to withhold food, and whether it [the policy] was constitutional in other cases just isn't appropriate."); Tr. 3 30:4-5 (wherein petitioner's counsel argued in closing that "[i]t's not the reasonableness of the rule itself. It's the implementation here.").

was no evidence that he became psychotic or suffered any other serious mental reaction from his lack of food" and that, therefore, the jury's verdict could not sustained. *Id.* at 17a-18a.

The Seventh Circuit affirmed. Judge Posner, writing for the panel, held that "[b]ecause to an overwhelming degree Freeman's food deprivation was self-inflicted, even if not 100 percent of it was, and the record contains no evidence that he experienced real suffering, extreme discomfort, or any lasting detrimental health consequences, the judgment for the defendants must be, and it is, [affirmed]." Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

I. The United States Court Of Appeals For The Seventh Circuit Decided An Important Federal Question In A Way That Conflicts With Controlling Decisions Of This Court.

In affirming the district court's grant of judgment as a matter of law in favor of the prison officials, the Seventh Circuit failed to follow this Court's established jurisprudence in two respects. First, the court of appeals' determination that Freeman was not punished within the meaning of the Eighth Amendment fundamentally conflicts with this Court's long line of Eighth Amendment precedents. Second, the court of appeals failed to follow this Court's well-established precedents relating to a district court's decision to overturn a jury verdict by granting a motion for judgment as a matter of law. Because the Seventh Circuit's analysis was severely flawed in both regards, the Court should grant this petition pursuant to Supreme Court Rule 10(c).

A. The Panel's Determination That There Was No "Punishment" Conflicts With This Court's Eighth Amendment Precedents.

The court of appeals focused exclusively on the question of whether the deprivation of petitioner's meals in and of itself constituted Eighth Amendment punishment. That analysis ignored the fact that petitioner has been subject to Eighth Amendment "punishment" from the first day he was locked up in a Wisconsin prison. And a long line of this Court's Eighth Amendment cases required respondents to provide him with food and the basic necessities of life during all times he was subject to that punishment.

It is well established that a complete deprivation of food violates an inmate's constitutional right to be free of cruel and unusual punishment. For example, in *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), this Court held that "the Eighth Amendment places restraints on prison officials," such as against excessive force, and further

> imposes duties ~~on these~~ officials, who must provide humane conditions of confinement; prison officials must ensure that inmates *receive adequate food*, clothing, shelter, and medical case, and "must take reasonable measures to guarantee the safety of the inmates."

Farmer, 511 U.S. at 832 (1994) (citations omitted) (emphasis added). Although "[t]he Constitution 'does not mandate comfortable prisons,'" prison officials are charged with maintaining conditions that do not "pos[e] a substantial risk of serious harm" to the inmates in their custody. *Id.* at 832, 834.

Similarly, in *Wilson v. Seiter*, 501 U.S. 294 (1991), this Court held that it would be an Eighth Amendment violation to deny a prisoner an "identifiable human need such as food." In *Wilson*, this Court indicated that the determination of whether "punishment" has taken place is built into the determination of subjective intent:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element

> must be attributed to the inflicting officer before it can qualify.[3]

Id. at 300.

In *Hutto v. Finney*, this Court evaluated the use of "grue"—a "substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture into a pan." 437 U.S. 678, 683 (1978). Prisoners on this diet received fewer than 1,000 calories a day. *Id.* According to the Court:

> A daily allowance of 2,700 calories is recommended for the average male between 23 and 50. National Academy of Sciences, Recommended Dietary Allowances, Appendix (8th rev. ed. 1974). Prisoners in punitive isolation are less active than the average person; but a mature man who spends 12 hours a day lying down and 12 hours a day simply sitting or standing consumes approximately 2,000 calories a day.

Hutto, 437 U.S. at 683 n.7. This Court found that "[a] filthy, overcrowded cell and a diet of 'grue' might be

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[3] The Court went on to quote the author of the panel opinion in this case:

> As Judge Posner has observed:
>
> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century.... [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985." *Duckworth v. Franzen*, 780 F.2d 645, 652 (CA7 1985), cert. denied, 479 U.S. 816, 107 S. Ct. 71, 93 L. Ed. 2d 28 (1986).

Wilson v. Seiter, 501 U.S. 294, 300 (1991).

tolerable for a few days and intolerably cruel for weeks or months." *Id.* at 686-87.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), a case in which this Court held that use of a "hitching post" violated Eighth Amendment standards, the Court held that it was established law that an officer's temporary denial of water to a prisoner who refused to do his share of work assigned to a farm squad "should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule," but that "a violation [would] have occurred if the method of coercion reached a point of severity such that the recalcitrant prisoner's health was at risk." *Id.* at 743.

The Seventh Circuit's determination that petitioner was not "punished" ignores the fact that petitioner was at all relevant times being imprisoned by the State of Wisconsin *as punishment for his crimes*. This Court's Eighth Amendment jurisprudence required the defendant officials to provide petitioner with food during his incarceration. Whether the deprivation of petitioner's meals did or did not constitute *additional* punishment ultimately does not matter under the Court's precedents.[4]

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[4] The court of appeals' focus on the penological justifications for the prison's meal delivery rules is reminiscent of the *Turner* test applied by this Court in other constitutional contexts, wherein a prison regulation claimed to infringe an inmate's constitutional rights may be upheld if it is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This Court has explicitly stated, however, that such a test is inapplicable in the Eighth Amendment context. *See Johnson v. California*, 543 U.S. 499, 511 (2005) ("[W]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner's* 'reasonably related' *(footnote continued...)*

The Seventh Circuit failed to even acknowledge, let alone properly apply the *Farmer* line of cases, instead choosing to find that unless there is evidence that an inmate is at death's door or suicidal, the "keys to the cupboard" argument controls the analysis. But that sets the bar far too high. Deprivation of "the minimal civilized measure of life's necessities," which creates a "substantial risk of serious harm" violates the Eighth Amendment under this Court's established precedent.[5]

B. The Panel Failed to Follow This Court's Precedents Relating to Review of a Grant of a Judgment as a Matter of Law Overturning a Jury Verdict.

The Seventh Circuit failed to follow this Court's precedents relating to proper appellate review of the grant of a motion for judgment as a matter of law following a jury verdict. Indeed, neither the Seventh Circuit opinion nor the district court opinion includes even a passing reference to a standard of review. *See* Pet. App. 1a-7a, 10a-18a. Both the district court and the court of appeals ignored the high standard required to overturn a jury's verdict based on a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure and instead chose to reweigh the evidence put forth at trial to reach their preferred result.

(continued from previous page)
standard.") (citations omitted). Thus, to the extent the Seventh Circuit applied such a standard to petitioner's claim, its decision conflicts with the clear precedent of this Court.

[5] And so the jury was instructed. Pet. App. 25a. To the extent that the court of appeals based its ruling on a determination that the harm suffered by petitioner was not sufficiently serious, see Part IB.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), this Court held that "[u]nder Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Id.* at 149 (citing Fed. Rule Civ. Proc. 50(a); *Weisgram v. Marley Co.*, 528 U.S. 440, 447-448 (2000)). Although the court is to review all the record evidence, "the court must draw all reasonable inferences in favor of the nonmoving party and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150 (citations omitted). Further, this Court has made clear that determining credibility, weighing evidence, and drawing legitimate inferences from the facts are the role of the jury rather than the judge. *Id.* at 150-51 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). The court is to disregard all evidence favorable to the moving party that the jury is not required to believe; "[t]hat is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" *Id.* at 151 (citations omitted).

Here the Seventh Circuit usurped the jury's role by proceeding with its own weighing of the evidence. For instance, the court of appeals opined that the "record contains no evidence that [Freeman] experienced real suffering, extreme discomfort, or any lasting detrimental health consequences...." Pet. App. 7a. The court stated:

> Twice Freeman did not receive a timely inspection and, as a result, on each occasion, went eight days straight without a meal. But there is no indication that his life or health was

> jeopardized. He lost 45 pounds over 31 months, but since he weighed 195 pounds at the beginning and is only 5 foot 6 inches tall he ended up closer to the normal weight for a person of his height than when he began. Not that that is a complete defense, as we indicated earlier. Because of the irregularity of his eating, he experienced unpleasant symptoms, such as blurred vision.

Pet. App. 6a-7a.

At trial, however, Freeman adduced evidence that he had missed hundreds of meals between April 2001 and October 2003 and that on at least two occasions he was not fed at all for periods exceeding a week. Pet. App. 10a-11a. Freeman testified that he began suffering from headaches, dizziness, difficulty breathing, difficulty defecating, and that he coughed up blood. Pet. App. 11a; Tr. 1 A 61. He testified that he began hearing and seeing things. Pet. App. 11a; Tr. 1 A 62:11. Freeman's medical expert, Dr. Linda Farley, also testified extensively about the deleterious effects of not eating and how quickly a person can be impacted by a lack of nutrition:

> [F]ood being absolutely essential to our functioning as an organism, even withholding food for 24 hours can use up the body stores of carbohydrates.
>
> The liver stores carbohydrates, so even within 24 hours, our carbohydrates are pretty much used up. And so then you go to the next 24 hours and the body begins to use its reserve of fat to supply the body's energy needs. And then if there's not much of that or as time goes on and food is withheld. ... I'm saying if

> hydration is still going on, as it was with Mr. Freeman, he was still drinking water, then the next thing is that the body, when the fat supplies are used up and the carbohydrate supplies were pretty much used up, then the body draws upon the muscles, the protein elements of the body itself.
>
> And this can cause all kinds of incredibly injurious things to our body function from weakness to low blood pressure to a lower metabolic rate, to other kinds of just symptoms that, such as were described that Mr. Freeman experienced, such as headaches, inability to— He described the inability to stand up and breathe properly and talk at the same time when he was without food for a period of time. So there's all kinds of massive kinds of ... deregulation of body functions.

Tr. 2 B 7-8. With regard to petitioner, Dr. Farley concluded: "Mr. Freeman, in periods of time, was deprived of adequate caloric intake, and judging by the weight loss which he suffered, which other people certainly noticed, it says to me that he was not receiving adequate nutrition for his size and weight and level of activity." Tr. 2 B 34:19-24.

The court of appeals also was of the opinion that petitioner was not punished. While acknowledging that denial of food is "certainly an unusual form of punishment nowadays," and that "in cases where it inflicts serious harm on a prisoner it is also cruel," the court of appeals discerned a difference "between food deprivation as a punishment" and "food deprivation as a consequence of a refusal to comply with a condition precedent to being fed." Pet. App. 2a, 4a.

As discussed in Part IA, the relevant "punishment" here was petitioner's incarceration in a state institution. But even if the proper inquiry was whether the extended deprivation of his meals was constitutional punishment in and of itself, there is hardly a bright line between "punishment" and "refusal." The issue of whether an inmate was "punished" necessarily depends upon the circumstances presented, and is inherently a fact question properly before the jury.[6]

Petitioner maintained throughout trial that he had never refused a meal, but that in all instances, the prison officials had subjected him to punishment for his failure to follow prison policy. Tr. 1 A 20:6-12, Tr. 1 A 40:18-19, Tr. 2 A 11-12, Tr. 2 A 14, Tr. 2 A 16-17, Tr. 2 A 102, Tr. 3 30:2-10. The meal delivery policy set out in the WSPF Inmates' Handbook requires inmates to stand in the middle of the cell with the light on and pants on in order to receive a meal. T. 1 B 43-44. Petitioner was denied meals many times because he did not have his pants on as required. Tr. 1 A 40:15-22, Tr. 1 A 41:1-9, Tr. 1 A 43:10-44:12, Tr. 1 A 44:18-45:5, Tr. 1 A 50:20-51:10, Tr. 1 A 51:24-25. Petitioner was also denied his meals for a variety of other reasons: he testified he was denied meals because he did not clean his cell, Tr. 1 A 45:6-16, Tr. 1 A 48:7-16; for wearing a sock around his head, Tr. 1 A 44:5-6, Tr. 1 A 48:22-49:10, Tr. 1 A 51:16-

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[6] The punishment inquiry relates to the subjective component of the Eighth Amendment analysis—the second necessary component—which requires that officers acted with a "sufficiently culpable state of mind." *Wilson*, 501 U.S. at 298. This Court in *Farmer* indicated that the knowledge requirement relative to deliberate indifference is a question of fact for the jury, opining that a factfinder "may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842.

25; for washing his hands instead of being in the middle of the cell; for standing by the television; or for sleeping through or not otherwise hearing an announcement of the meal, Tr. 1 A 54:14-22, Tr. 1 A 55:3-56:2. Throughout the trial, petitioner urged the jury to find that these deprivations constituted punishment. Tr. 1 A 16:21-24, Tr. 1 A 17:9-21, Tr. 1 A 19:15-20:12, Tr. 3 13:13-14:25; Tr. 3 30:3-15.

Defendants, on the other hand, maintained that they had not *punished* petitioner by withholding his food, but instead, that petitioner had *refused* his meals by failing to comply with the rules. Tr. 1 B 53-54, Tr. 1 B 67:17-25, Tr. 1 B 69-70, Tr. 1 B 75:2-16, Tr. 1 B 84-85, Tr. 1 B 91-93, Tr. 1 B 119-120, Tr. 1 B 124:17-25, Tr. 3 22-25. Respondent Huibregtse even agreed that the use of food as punishment is unacceptable from a corrections standpoint. Tr. 2 A 19:1-8.

The court of appeals, by declaring that petitioner had *not* been subjected to punishment, simply appropriated for itself the key factual issue in the case—an issue that the jury found in petitioner's favor. The jury was entitled to find that, despite petitioner's recalcitrant behavior, the prison officials' responsive behavior—to withhold his meals for extensive periods of time—was constitutionally impermissible punishment. Contrary to this Court's precedents, the court of appeals substituted itself for the jury as the finder of fact.

II. The Seventh Circuit's Decision Conflicts With The Decisions Of Other United States Courts Of Appeals On The Same Important Issue.

A. The Seventh Circuit Held Deprivations of Food Including Periods Lasting Eight Consecutive Days Are Not "Sufficiently Serious" to Meet the Objective Component of Petitioner's Eighth Amendment Claim.

While acknowledging that Freeman on at least two occasions missed all meals for at least eight consecutive days, the Seventh Circuit found that there was no evidence of sufficiently serious harm to support his Eighth Amendment claim. After concluding that Freeman did not suffer punishment within the meaning of the Eighth Amendment, the court went on to acknowledge that "[i]t does not follow from anything we have said ... that a prison can allow a prisoner to starve himself to death, or even starve himself to the point at which he seriously impairs his health." Pet. App. 4a–5a. The court of appeals found that "at some point it may have to force-feed the prisoner to prevent him from seriously endangering his health." Pet. App. 5a.

While acknowledging the prison has, at some point, a responsibility to step in, the Seventh Circuit found that even the two undisputed deprivations of eight days straight were *insufficient* to constitute an Eighth Amendment violation, as a matter of law. *Id.* at 6a–7a.

B. Other Federal Appellate Courts Have, In a Variety of Circumstances, Applied the Deliberate Indifference Standard and Found Allegations of Comparable or Lesser Deprivations Maintainable.

Numerous federal appellate courts outside the Seventh Circuit have had occasion to review inmate allegations of food deprivation in various contexts. These courts, unlike the Seventh Circuit, have found that deprivations of food, even partial or for shorter durations than those alleged in the present case, could sustain an Eighth Amendment claim.

1. The Fifth Circuit.

In an analogous case, the Fifth Circuit held that officers had no entitlement to qualified immunity and that the district court should not have dismissed an inmate's allegations of food deprivation be vacated. *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (5th Cir. 1991). The inmate in *Cooper* alleged that he was denied meals for thirteen days, twelve of which were consecutive. *Id.* at 1081. The facility at issue had a policy that "all inmates dress fully for all meals" and that if an inmate is not fully dressed and refuses to fully dress, "'he voluntarily rejects the meal.'" *Id.* (citations omitted). The inmate conceded that he refused to dress fully before meals. *Id.* The court held that the mere existence of a regulation "is not an automatic shield against a civil rights suit." *Id.* at 1083. Indeed, although the court recognized that complaints against enforcement of regulations that deprive inmates of certain privileges may, "in the proper circumstances, be dismissed as frivolous," the court noted that "[w]hether, ... a prisoner's meals constitute a like 'privilege' is questionable." *Id.* The court of appeals further found

that deprivation of adequate food is a form of corporal punishment and that, as such, the Eighth Amendment "imposes limits on prison officials' power to so deprive a prisoner." *Id.* Based on the findings, the court of appeals concluded that "Cooper's assertion that he was continuously deprived of food presents a set of facts that may entitle him to relief." *Id.*

The Seventh Circuit, in acknowledging that deprivation of food is an unusual punishment and one that is cruel when it inflicts serious harm on a prisoner, cited another case from the Fifth Circuit, *Talib v. Gilley*, 138 F.3d 211 (5th Cir. 1998). The reasoning in *Talib*, however, directly contradicts the decision reached by the Seventh Circuit. In *Talib*, the Fifth Circuit found that the circumstances—an inmate missing approximately one out of every nine meals for failure to follow a prison rule—did not rise to the level of a constitutional violation. *Id.* However, comparing its case to *Cooper*, the court recognized that there are limits to the deprivations that may be imposed in the name of prison discipline, even where a reasonable rule exists:

> The deprivation of food constitutes cruel and unusual punishment only if it denies a prisoner the "'minimal civilized measure of life's necessities.'" Whether the deprivation of food falls below this threshold depends on the amount and duration of the deprivation. Talib alleges that he missed about fifty meals in five months and lost about fifteen pounds. Missing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period. We are therefore doubtful that Talib was denied anything close to a minimal measure of life's necessities.

> Our decision in *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078 (1991) requires no less. There, Cooper, a prisoner, alleged that prison officials refused to feed him any food for twelve consecutive days. Given the clearly substantial nature of this deprivation, the court held that "Cooper's assertion that he was *continuously* deprived of food presents a sets of facts that may entitle him to relief." *Id.* at 1083 (emphasis added). Talib, on the other hand, has not alleged a continuous and substantial denial of food, nor does the record support such an inference. Thus, the unique circumstances controlling the *Cooper* case—the complete deprivation of food over an extended period of time—are simply not present in this case.

Talib, 138 F.3d at 214 n.3 (internal citations omitted).

In a more recent case out of the Fifth Circuit, the court applied a similar analysis, again finding that the alleged deprivation was not sufficiently serious and the case properly dismissed. *Berry v. Brady*, 192 F.3d 504 (5th Cir. 1999). In *Berry*, an inmate alleged cruel and unusual punishment on the basis that he was denied eight meals (not, apparently, consecutive) as punishment for his refusal to shave in accordance with institution policy. *Id.* at 506. Even in this context, again analogous to the present case, the court of appeals found that "[t]o establish an Eighth Amendment claim, the prisoner must demonstrate, *inter alia*, an objective component of conditions so serious as to deprive him of the minimal measure of life's necessities, as when denied some basic human need." *Id.* at 507. Noting that the Constitution requires that inmates are provided nutritionally adequate food, the court held that "'[w]hether the deprivation of

food falls below this threshold depends on the amount and duration of the deprivation.'" *Id.* (internal citation omitted). Since the inmate did not allege he was deprived of a nutritionally adequate diet or that he suffered any physical harm other than hunger pains, the court upheld the magistrate judge's finding that the claim was frivolous. *Id.* at 508.

2. The Second Circuit.

The Second Circuit reversed a district court's dismissal of an inmate's complaint that prison officials violated his Eighth Amendment rights by placing him on a nutritionally inadequate diet. *Phelps v. Kapnolas*, 308 F.3d 180 (2d Cir. 2002). The inmate in that case alleged that he was placed on a "restricted diet" consisting of raw cabbage and "bread-like loaf that appeared to contain ground vegetables" for 14 days after being charged with throwing a Styrofoam bowl of cereal. *Id.* at 182. The inmate claimed the restricted diet was nutritionally inadequate. *Id.* (citation omitted). Noting that under this Court's precedents, "prisoners may not be denied 'the minimal civilized measure of life's necessities,'" *id.* at 185, and that under the Eighth Amendment prisoners must not be deprived of their basic human needs, including food, the court found the inmate's allegations that the he was deprived of a nutritionally adequate diet for fourteen consecutive days were "not as a matter of law insufficiently serious to meet the objective requirement." *Id.* at 186. The inmate claimed that, as a result of the inadequate diet, he "lost over thirty pounds, suffered severe abdominal pain, and suffered severe emotional distress, which caused or exacerbated mental illness from which [he] continues to suffer today." *Id.* at 182 (citation omitted).

In an earlier case, the Second Circuit found a complaint by inmates alleging that they were denied adequate meals by an official who refused to feed them on 12 days, three of which were consecutive, within a 53 day period and that the food was contaminated by officials. *Robles v. Coughlin*, 725 F.2d 12, 13 (2d Cir. 1983). Citing, among other things, a district court opinion in which deprivation of food for four days was held unconstitutionally disproportionate punishment for violation of a disciplinary rule, *see Moss v. Ward*, 450 F. Supp. 591, 596-97 (W.D.N.Y. 1978), the Second Circuit held that the combined allegations of food deprivation and food contamination were sufficient to withstand dismissal. *Robles*, 725 F.2d at 15-16.

Notably, the Second Circuit has explicitly rejected the position that conduct does not constitute a violation of the Constitution if an inmate holds the so-called "keys to the cupboard." In a non-food related prisoner case, the Second Circuit held that the court "in no way endorsed the proposition that a prisoner who 'holds the keys to his cell' may be subjected to treatment which would otherwise be impermissible under the Eighth Amendment." *Williams v. Greifinger*, 97 F.3d 699, 705 (2d Cir. 1996).

3. The Tenth Circuit.

In one of the earlier cases dealing with food deprivation, the Tenth Circuit held that it could not conclude, "as a matter of law, that 50 ½ hours of starvation was not cruel and unusual punishment." *Dearman v. Woodson*, 429 F.2d 1288, 1290 (10th Cir. 1970). In *Dearman*, the court set aside an order dismissing the case and remanded the case, holding that, although there were indications that a "riot atmosphere" existed during the time period in question, "we think it is

beyond dispute that a punishment may be cruel and unusual when, although applied in pursuit of legitimate penal aims, it goes beyond what is necessary to achieve those aims." *Id.* The court of appeals further described its analysis of the deprivation, given the purported disciplinary context:

> In *Bethea v. Crouse*, 417 F.2d 504 (10th Cir. 1969), we considered in fair detail the general principles governing prisoner complaints of constitutional deprivations. As we there noted, we are always hesitant to review matters of prison administration. But when the care, treatment or discipline of those confined amount to a clear abuse or caprice on the part of prison officials, we will give cognizance to the complaint. The ultimate issue in the instant controversy poses exactly that question: Were the acts mere discipline in pursuit of quelling a prison disturbance or were they something more which amounted to a clear abuse or caprice, resulting in an infringement of constitutional rights?

Dearman, 429 F.2d at 1290.

4. Other Appellate Courts.

As the decisions of the Seventh, Second, Tenth, and Fifth Circuits indicate, there is a conflict between the Seventh Circuit's holding that a deprivation of hundreds of meals, including two periods lasting at least eight consecutive days, was not, as a matter of law, "sufficiently serious" to meet the objective component of the deliberate indifference test and the rulings by other circuits. Indeed, even where other circuits have found insufficient harm for the case to go forward, the amounts and/or duration of the deprivations have been nothing

close to that of the present case. For example, the Eighth Circuit found that a sandwich diet, lacking fruits and vegetables, might violate the Eighth Amendment if imposed as a regular diet, but that since it was imposed only for nine-day lockdown period implemented in response to a violent and disruptive atmosphere in the prison, it was a "constitutionally permissible response." *Rust v. Grammer*, 858 F.2d 411, 412-14 (8th Cir. 1988).

The Ninth Circuit—in a case involving a uniquely violent inmate who regularly attempted to attack guards or other inmates and, further, threw items out of his cell at guards, including feces, hot water and food—evaluated the inmate's complaint that imposition of a nutraloaf diet for periods up to seven days as a sanction for misbehavior violated his Eighth Amendment rights. *LeMaire v. Maass*, 12 F.3d 1444, 1449-50 (9th Cir. 1993). Acknowledging that the Eighth Amendment requires that "prisoners receive food that is adequate to maintain health," the court found that a Nutraloaf diet was nutritionally adequate and did not meet the threshold required by the objective component described in this Court's *Wilson* decision. *Id.* at 1456. The court found that Nutraloaf, unlike the "grue" discussed in *Hutto v. Finney*, 437 U.S. at 686-87, provided an "excess of nutritional requirements" and further, unlike the inmates in *Hutto* who lost weight, LeMaire actually gained weight on the diet. *LeMaire*, 12 F.3d at 1456.

Thus, in cases outside the Seventh Circuit, courts have acknowledged the deference due to prison officials, but have not found that a disciplinary context eclipses the need to evaluate the amount and duration of the deprivation, just as would be done in any conditions of confinement case. This Court should grant certiorari to mend this divide.

CONCLUSION

The scope of an inmate's right to nutritionally adequate food is an important question of federal law that should be addressed by this Court. The need for this Court to grant certiorari is apparent, given the conflict between the Seventh Circuit's decision in this case and decisions by this Court and other federal appellate courts. For these reasons, petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully Submitted,

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BERRELL FREEMAN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-2820

BERRELL FREEMAN,
Plaintiff-Appellant,

v.

GERALD A. BERGE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 03-C-21-C—Barbara B. Crabb, Chief Judge.

ARGUED NOVEMBER 7, 2005—
DECIDED MARCH 23, 2006

Before POSNER, EASTERBROOK, and WOOD, Circuit Judges.

POSNER, *Circuit Judge*. A jury in this suit under 42 U.S.C. § 1983 (denial of federal right under color of state law) found that the defendants, officials at a Wisconsin prison, had inflicted cruel and unusual punishment on inmate Freeman by denying him meals. The jury awarded him $50,000 in compensatory damages, plus punitive damages, incomprehensible in light of the evidence, aggregating $1.2 million. The judge granted judgment as a matter of law for the defendants. Freeman appeals from that judgment, seeking reinstatement of the jury's verdict.

Freeman is serving a 58-year sentence in Wisconsin's maximum-security prison (nicknamed the "Supermax," *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006); see *Jones-El v. Berge*, 374 F.3d 541, 542-43 (7th Cir. 2004)) for a variety of violent crimes. Inmates in the Supermax are fed their three meals a day in their cells. The prison's feeding rule requires that the prisoner stand in the middle of his cell, with the lights on, when the meal is delivered and that he be wearing trousers or gym shorts. If the inmate does not comply with the rule, the meal is not served him. Freeman wanted to eat in his underwear, so on a number of occasions over a two-and-a-half-year period he refused to put on pants or gym shorts and as a result was not served, and because he skipped so many meals he lost 45 pounds. The prison also refused to serve him when he had a sock on his head (which could be used as a weapon, depending on what was in it), when his cell walls were smeared with blood and feces that he refused to clean, and when he was asleep.

His behavior was disgusting. But he argues that denial of food is a cruel and unusual punishment for the violation of a prison rule or norm. It is certainly an unusual form of punishment nowadays, and in cases in which it inflicts serious harm on the prisoner it is also cruel. *Reed v. McBride*, 178 F.3d 849, 853-54 (7th Cir. 1999); *Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002); see *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Sanville v. McCaughtry*, 266 F.3d 724, 733-34 (7th Cir. 2001); *Talib v. Gilley*, 138 F.3d 211, 214 n. 3 (5th Cir. 1998). But there is a difference between using food deprivation as a punishment and establishing a reasonable condition to the receipt of food. Suppose that when a guard delivered a food tray to Freeman, Freeman hurled it at the guard. Freeman would have missed a meal but it would be a consequence not of punishment but of a reasonable condition of being fed—that you not throw back the food in the server's face. In such a case Freeman would

be the author of his deprivation rather than a victim of punishment. *Rodriguez v. Briley*, 403 F.3d 952 (7th Cir. 2005).

The same is true here. The pants requirement may not seem a reasonable condition on receiving food but it is. In the words of the appellees' lawyer in his opening statement to the jury, "There are two primary reasons. Number one, there are a lot of women security officers working in this facility so they are entitled to basic privacy. Secondly, there are security issues. Inmates throw urine, feces, expose themselves, ejaculate, and to prevent that from happening to any security officer, there is a rule that the inmate must be clothed." The pants requirement, violation of which was the major cause of Freeman's missed meals, imposed a condition that he could readily have complied with; he offers no excuse for his noncompliance.

He missed some meals not because of the pants rule but because of the sock on the head, the blood and feces on the wall, or his being asleep. The refusal to serve him in the first of these cases, whether or not authorized or directed by any rule, cannot be thought unreasonable; the sock posed a potential threat to the guards. The possibility of contamination of the food by blood or feces might justify refusal to serve a meal in the second case, but this is not argued. Unless the guards had difficulty waking him or were fearful as to how he might react to being wakened, his being asleep at mealtime would not be a good reason for not feeding him. But Freeman failed to show how many of his missed meals were missed for reasons that cannot be easily related to the refusal to comply with a reasonable condition on the receipt of food, except that he testified that he received only one meal a day for two weeks because he refused to keep his cell clean (at the end of that time prison employees cleaned it). That deprivation by itself would not in the circumstances of this case rise to the level of cruel and unusual punishment.

The reason for distinguishing between food deprivation as a punishment and food deprivation as a consequence of a refusal to comply with a condition precedent to being fed is that if as Freeman argues any deprivation of food is an unconstitutional punishment, a food policy cannot be enforced, at least against prisoners in Freeman's situation. When we asked his lawyer what alternative response to her client's behavior would have been effective in getting Freeman to comply with the food policy, all she could think of was placing him in segregation (but he already is in segregation—that is why he is being served all his meals in his cell), denying him good-time credits, or depriving him of commissary and other privileges, such as a television set in his cell. Given the length of his sentence and what is plainly a propensity for obstreperous behavior, it is unlikely that a denial of good-time credits will inflict significant disutility on him; and as far as denial of privileges is concerned, he has been denied privileges, without the denial having deterred him from continuing to violate the food rule. The logic of his position is that if he refuses any meal that is not prepared by Charlie Trotter, the prison must procure his meals from Trotter's catering service and cast about for some method unrelated to food of discouraging him from making such demands. Freeman refuses to take seriously the practical limitations of prison discipline as a means of maintaining an orderly environment.

A better argument is that while alternative responses to Freeman's behavior may have seemed unpromising, food deprivation turned out not to be very effective either, for it took more than two years for the deprivation to be effective—and it is not clear that hunger or the health effects of loss of weight was what motivated Freeman to start eating again. But we are pointed to no alternatives that would have been more efficacious.

It does not follow from anything we have said, however, that a prison can allow a prisoner to starve himself to death,

or even starve himself to the point at which he seriously impairs his health, which could happen even if his ending weight was "normal" (imagine a person whose weight falls from 250 to 150 pounds in a couple of months). The prison cannot be forced by such tactics to change an otherwise reasonable rule, *Rodriguez v. Briley*, *supra*, 403 F.3d at 953; *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *Talib v. Gilley*, *supra*, 138 F.3d at 216; *In re Caulk*, 480 A.2d 93, 96 (N.H. 1984); *People ex rel. Illinois Dept. of Corrections v. Millard*, 782 N.E.2d 966, 972 (Ill. App. 2003), but at some point it may have to force-feed the prisoner to prevent him from seriously endangering his health.

Two situations can be distinguished. In the first, the prisoner is insane, and his insanity causes him to refuse food; the prison is constitutionally obligated to treat his mental illness, if necessary by force-feeding him. *Sanville v. McCaughtry*, 266 F.3d 724, 733-34 (7th Cir. 2001); *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001). In the second situation, the prisoner is perfectly sane, but he either wants to commit suicide (and there are rational suicides) or he is prepared to risk death from a hunger strike to make a political point. Free people who are sane have a liberty interest in refusing life-saving medical treatment, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278-79 (1990); see *Washington v. Glucksberg*, 521 U.S. 702, 722 n. 17 (1997), and likewise in refusing to eat, *Blouin ex rel. Estate of Pouliot v. Spitzer*, 356 F.3d 348, 359 (2d Cir. 2004); *Bouvia v. Superior* Court, 225 Cal. Rptr. 297, 300, 305 (App. 1986); see also *Washington v. Glucksberg*, *supra*, 521 U.S. at 723, a method by which some elderly people commit suicide. Ronald M. Holmes & Stephen T. Holmes, *Suicide: Theory, Practice, and Investigation* 59-60 (2005); Martin Tolchin, "When Long Life Is Too Much: Suicide Rises Among Elderly," *New York Times*, July 19, 1989, p. A1. But either prisoners don't have such an interest, or it is easily overridden. *In re Grand Jury Subpoena John Doe*, 150 F.3d 170, 172 (2d Cir. 1998) (per curiam); *Martinez*

v. Turner, 977 F.2d 421, 423 (8th Cir. 1992); *Laurie v. Senecal*, 666 A.2d 806, 809 (R.I. 1995); *In re Caulk*, *supra*, 480 A.2d at 96-97; *State ex rel. White v. Narick*, 292 S.E.2d 54, 58 (W. Va. 1982); *McNabb v. Department of Corrections*, 112 P.3d 592, 594-95 (Wash. App. 2005); *People ex rel. Dept. of Corrections v. Fort*, 815 N.E.2d 1246, 1250-51 (Ill. App. 2004); contra, *Zant v. Prevatte*, 286 S.E.2d 715, 716- 17 (Ga. 1982).

The reasons are practical. (No longer does one hear that prisoners must not be allowed to evade punishment by killing themselves and thus "cheating the gallows.") If prisoners were allowed to kill themselves, prisons would find it even more difficult than they do to maintain discipline, because of the effect of a suicide in agitating the prisoners. Prison officials who let prisoners starve themselves to death would also expose themselves to lawsuits by the prisoners' estates. Reckless indifference to the risk of a prisoner's committing suicide is a standard basis for a federal civil rights suit. E.g., *Boncher ex rel. Boncher v. Brown County*, 272 F.3d 484 (7th Cir. 2001). The idea behind liability in such cases is that incarceration can place a person under unusual psychological strain and the jail or prison under a commensurate duty to prevent the prisoner from giving way to the strain. The analysis is applicable when suicide takes the form of starving oneself to death. See *Laurie v. Senecal*, *supra*, 666 A.2d at 809; *Commonwealth of Pennsylvania, Dept. of Public Welfare v. Kallinger*, 580 A.2d 887, 893 (Commonwealth Ct. 1990).

So at some point in Freeman's meal-skipping the prison doctors would have had a duty and certainly a right to step in and force him to take nourishment. Knowing this, the prison has a policy of requiring a prisoner who has skipped all his meals for three consecutive days to be inspected by employees of the prison's health service to make sure he isn't seriously endangering his health. Twice Freeman did not receive a timely inspection and as a result, on each occasion,

went eight days straight without a meal. But there is no indication that his life or health was jeopardized. He lost 45 pounds over 31 months, but since he weighed 195 pounds at the beginning and is only 5 foot 6 inches tall he ended up closer to the normal weight for a person of his height than when he began. Not that that is a complete defense, as we indicated earlier. Because of the irregularity of his eating, he experienced unpleasant symptoms, such as blurred vision. But there is no evidence that the defendants knew that he was endangering his health sufficiently to require drastic intervention. He was visited by nurses who confirmed that he was taking water and checked his appearance through the window of his cell, and he was visited by a doctor as well though at some point he began refusing to see the doctor. No doubt he would have sued the defendants for battery had they ordered him force-fed.

Because to an overwhelming degree Freeman's food deprivation was self-inflicted, even if not 100 percent of it was, and the record contains no evidence that he experienced real suffering, extreme discomfort, or any lasting detrimental health consequences, the judgment for the defendants must be, and it is,

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed May 19, 2005]

Case No. 03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; JON LITSCHER; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; JOHN SHARPE, Unit Manager (former) in his individual capacity; and BRAD HOMPE, Unit Manager, in his individual capacity,

Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

This action came for consideration before the court with DISTRICT JUDGE BARBARA B. CRABB presiding. The issue have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the motion of defendants Gerald Berge, Peter Huibregtse and Brad Hompe for judgment as a matter of law is GRANTED and judgment entered December 30, 2004 is VACATED.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered DISMISSING this case as to all defendants.

Approved as to form this 18th day of May, 2005.

/s/ Barbara B. Crabb
BARBARA B. CRABB
DISTRICT JUDGE

/s/ Theresa M. Owens
Theresa M. Owens
Clerk of Court

May 19, 2005
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed May 17, 2005]

03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; and BRAD HOMPE, Unit Manager, in his individual capacity,

Defendants.

OPINION AND ORDER

In a recent case, the Court of Appeals for the Seventh Circuit held that the denial of meals to a prisoner is not punishment within the meaning of the Eighth Amendment if the denials are a response to the prisoner's refusal to obey a valid institutional regulation. *Rodriguez v. Briley*, 403 F.3d 952, 952-53 (7th Cir. 2005) ("deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment"). *Rodriguez* bears directly on the case before the court, in which plaintiff Berrell Freeman sued prison officials Gerald Berge, Peter Huibregtse, Gary Boughton and Brad Hompe pursuant to 42 U.S.C. § 1983 for damages and injunctive relief. Plaintiff alleged that he had suffered injuries as a result of defendants' enforcement of an institution policy under which inmates who do not wear pants (shorts or trousers), stand in the middle of their cells and turn on their cell lights

before their meals are delivered are considered to have refused the meals. Plaintiff contended that defendants had violated his Eighth Amendment protection against cruel and unusual punishment by enforcing a prison policy that resulted in plaintiff's not receiving hundreds of meals over a three to four year period. In addition to the meal policy claim, plaintiff raised a number of other claims about the conditions in which he was held at the Wisconsin Secure Program Facility, all of which were dismissed in pretrial rulings.

At trial, plaintiff adduced evidence that he had been denied meals on hundreds of occasions over a period of about 27 months because he had refused to put shorts or pants over his underwear or turn on his light in accordance with the meal delivery policy, had worn a sock around his head, refused to clean his cell or slept through the announcement of the meal. He missed meals for three days in April 2001; he missed approximately 242 meals between July 6, 2001 and November 3, 2001; he missed all meals for two consecutive days in April 2002; he missed meals for at least eight consecutive days in June through early July 2002; he missed meals for several consecutive days in February 2003; he missed meals for three consecutive days in March 2003; he received only his breakfast meal each day from May 18 until June 5, 2003; he missed all meals for two periods in September 2003, one lasting two days and one lasting four; and he missed all meals for at least eight straight days during October 2003. Plaintiff testified that as a result of the missed meals, he lost weight, had headaches, constipation, trouble breathing and walking, suffered from depression and started hearing and seeing things.

At the end of the liability phase of the trial, the jury found that plaintiff had been subjected to a serious deprivation of his basic need for food while he was confined at the Secure Program Facility between April 23, 2001 and October 12, 2003 and that defendants Gerald Berge, Peter Huibregtse and Brad Hompe had acted or failed to act with deliberate indif-

ference or reckless disregard of the inhumane conditions of confinement complained of by plaintiff. The jury found no liability as to defendant Gary Boughton. In the damages phase, the jury found that plaintiff suffered physical injury from defendants' action or inaction. The jury was sufficiently concerned about plaintiff's treatment that it awarded him $50,000 in compensatory damages and $400,000 in punitive damages against each of the remaining defendants. Following the entry of judgment, defendants renewed their motion for judgment as a matter of law and moved in the alternative for a new trial or a remittitur of the compensatory damages in the amount of $25,000. Plaintiff filed a motion relating to attorney fees.

Shortly after the post-trial briefing was completed, the Court of Appeals for the Seventh Circuit decided *Rodriguez*, 403 F.3d 952. The rule at issue in *Rodriguez* was one that required inmates to store their belongings in a storage box before they left their cells; if they did not do so, they were not allowed to leave the cell, even for a shower or a meal. Rodriguez refused to put his belongings into his storage box with the result that he missed about 75 showers and between 300 and 350 meals and lost 90 pounds over the course of 18 months. The court of appeals held that he was never subjected to any "punishment"; rather, he punished himself. "As soon as Rodriguez puts his belongings in the storage box, he can leave his cell and go to the cafeteria. So, he was not punished, and we need not decide whether, or how many, skipped meals constitute a cruel and unusual punishment for violation of a valid prison regulation." *Id.* at 953. The court added that at some point, "refusal to eat might turn suicidal and then the prison would have to intervene. Likewise if noncompliance with the rule were a product of insanity." *Id.* (internal citations omitted).

Plaintiff suggests that his case is distinguishable from *Rodriguez* because Rodriguez never challenged the validity of

the rule requiring him to stow his belongings before leaving his cell and because the rule had a safety or security purpose. (It promoted fire safety, facilitated cell searches and "in other ways as well promote safety and security." *Id.* at 952.) Plaintiff points out that he was denied meals not only for failing to wear pants but on one occasion, for failing to clean the blood and feces he had smeared on the walls of his cell.

Nothing in the court of appeals' holding suggests that the court would view the rules at issue in this case as "invalid" for the purpose of determining whether plaintiff was subjected to punishment for refusing to follow them. The law gives prisons and their administrators wide latitude with respect to day-to-day operations. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The rules at issue in this case could be justified as designed to decrease incidents of sexual exhibitionism, safety (standing in mid-cell with the lights on protects the officers who are setting food trays on the trap, as does not being able to wear a sock around one's head to hide a potential weapon), health and cleanliness.

In *Rodriguez*, the court of appeals had no reason to decide whether an inmate might have an actionable Eighth Amendment claim if he could show that he had suffered serious harm that did not rise to the level of being "suicidal" or to any other "substantial risk of serious harm" because that issue was not present in the suit. The consequences of Rodriguez's refusal to obey the rule were limited to weight loss (which the court seemed to think was beneficial to him), fatigue and a rash. It is likely that the court would view a showing amounting to a substantial risk of serious harm as sufficient to change the calculus. Although prison officials may legally deny food to inmates who refuse to comply with institution rules, they cannot stand by and allow an inmate to bring upon himself a substantial risk of serious harm to his health or safety. *Farmer v. Brennan*, 511 U.S. 825 (1994). As I noted in the December 17, 2003 order in this case denying defen-

dants' motion for summary judgment, "It is one thing to acknowledge that prison officials have a legitimate interest in enforcing compliance with prison rules. It is quite another to conclude that there are no limitations on the enforcement of those rules so long as the prisoner always has a choice to comply." Dkt. #129 at 16. At some point, intervention is required to preserve the inmate's health and life.

In the December 17 order, defendants were denied summary judgment on the ground that a reasonable jury could find that plaintiff was subjected to a substantial risk of serious harm to his health when he was denied food as many as 242 times between July and November 2001. Defendants argued that the Eighth Amendment did not apply to a case of food deprivation when the inmate could have received the food if he had chosen to comply with the rule at issue. In response to this argument, I noted that it was true that no court had held that using food as a tool for behavior modification was a violation of the Eighth Amendment in all circumstances, although some courts had questioned the penological value of the practice. In plaintiff's case, however, the evidence that was undisputed for the purpose of summary judgment showed that he had been denied food repeatedly for periods lasting several days or longer. I rejected defendants' argument to the extent that they argued that there were no limitations on the enforcement of compliance with prison rules so long as the prisoner always has the choice of complying. Such an approach seemed inconsistent with the case law holding that prison officials may be liable if they are shown to have been deliberately indifferent to an inmate's risk of harming himself in a suicide attempt, even though the immediate cause of the injury is the inmate's own actions. In my view, the question was whether the inmate's nutrition is sufficient to maintain his health; if it was not, an Eighth Amendment violation could be made out even if the defendants had denied the inmate food for violations of rules and not because of malice or neglect. *Williams v. Greifinger*, 97 F.3d 699, 705 (2d Cir.

1996) (even when inmate holds "'the key to his cell,' in the sense that by agreeing to comply with prison rules he could have achieved release from segregation; . . . that fact in no way relaxe[s] the court's inquiry into the adequacy of the conditions to which [inmate] was subjected"); see also *Cooper v. Sheriff, Lubbock County, Texas*, 929 F.2d 1078, 1083 (5th Cir. 1991) (holding that prisoner stated cause of action when he alleged that prison officials had withheld food from him for long periods of time because he refused to follow dress regulations for meals; "facially permissible form of punishment may, for example, through continual use inflict cruel and unusual punishment").

Rodriguez, 403 F.3d 952, does not undermine the view that at some point, the denial of food to an inmate may violate the Eighth Amendment even if the denial is the result of the inmate's own choice not to follow the rules. To do so, however, the denial must result in the substantial risk of serious harm. It is only extreme deprivations that make out an Eighth Amendment claim. *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992) (holding that only "those deprivations denying the 'minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment claim").

In the course of ruling on the parties' motions prior to trial, I understood plaintiff to be raising an "as applied" challenge to defendants' policy. For example, in the order denying defendants' motion for qualified immunity, I stated, "I do not understand [plaintiff's] second amended complaint to present a facial challenge to the [meal] policy. Rather, as I read the complaint, [plaintiff] is alleging that defendants' implementation of the policy is unconstitutional because its enforcement has resulted in the denial of hundreds of meals on at least a semi-regular basis over several years and for more than a week at a time on two occasions." Nov. 10, 2004 Op. & Order, dkt. # 181, at 10. At trial, however, plaintiff based his case on a facial challenge to the policy of using food to

coerce behavior. His counsel began her opening statement by saying

> This case is about whether the Wisconsin Prison System can withhold the food from prison inmates as a punishment for not following prison rules or whether that practice violates the United States Constitution.

In light of the decision in *Rodriguez*, it is clear that this facial challenge to the policy is untenable. However, the outcome would have been the same even if he had continued to challenge the policy as it was applied to him because he was unable to show that he had been subjected to a substantial risk of serious harm. He adduced no evidence that before October 2003, he had ever been denied more than nine meals in succession, so as to trigger the institution's policy of bringing in a doctor and nurse to assess an inmate's health status and he admitted that nurses started visiting him in October, which is when he missed nine consecutive meals. He testified that he continued to drink water even when he missed meals and that he saw nurses during the periods when he was not receiving every meal. His own expert witness testified that plaintiff's lack of food could have caused him headaches, dizziness, muscle weakness, inability to stand for long periods of time and difficulty breathing and talking but she did not identify these particular consequences as serious physical harm. She testified also that so long as plaintiff was drinking water, he could go without food for several weeks before experiencing organ failure. She did note one study in which 36 healthy men in the military were given only half of their caloric requirements for a six-month period and that two or three of the men had become psychotic at the end of the study. In addition, she testified that starvation, or organ failure, would be the end of a continuum of physical harm that individuals suffer as a result of lack of food. She agreed that nothing in plaintiff's medical records showed that he had come anywhere near the point of organ failure and that she

would not expect to see a significant health risk where an individual goes three days without eating but continues to drink liquids. Also, she noted that the institution records showed that on several occasions a Dr. Maier had ordered a high caloric, high protein diet for plaintiff when he was losing weight and that the diet orders were carried out.

One of the institution nurses testified that when plaintiff did miss more than nine consecutive meals in October 2003, the institution initiated its hunger strike protocol, under which nurses began monitoring plaintiff, giving him information about the risks of not eating and assessing his vital signs. Had plaintiff continued to refuse to follow the meal service policy, the nurses would have had a doctor see him and they could have taken additional steps to assess his condition, such as weighing him and drawing blood for analysis.

Defendant Hompe testified that institution policy requires staff to generate an incident report when an inmate misses nine consecutive meals and give notice to the health services unit, clinical services, the unit manager and the security director. At that point, the health services unit places the inmate on hunger strike protocol for monitoring and both the sergeant and the unit manager talk to the inmate to try to find out why he is refusing meals. A multidisciplinary meeting is held to discuss the inmate and others with special needs to make sure that the inmate is being monitored and the doctor is assessing him. In extreme conditions, the institution will notify lawyers and obtain a court order for forced feeding or hydration.

The trial evidence falls short of establishing that plaintiff's course of conduct and defendants' response subjected plaintiff to a substantial risk of serious harm. There was no evidence that any of his physical problems amounted to serious harm; he missed more than nine consecutive meals on only one occasion, in October 2003, and he continued to drink water when he was missing meals. He never reached the point of organ failure or came close to it. There was no evidence

that he became psychotic or suffered any other serious mental reaction from his lack of food. Therefore, the jury's finding of liability cannot be sustained. Because plaintiff did not prove he was at risk, he did not prove the first of the two prongs that are necessary to establish an Eighth Amendment claim: a substantial risk of serious harm. Without a showing of a substantial risk, he has no basis on which to argue the second prong: that defendants were deliberately indifferent or acted in reckless indifference to the risk. Plaintiffs' failure to prove the facts necessary to sustain his Eighth Amendment claim moots the issue of defendants' entitlement to qualified immunity and plaintiff's motion relating to attorney fees.

Although the verdict cannot be upheld in light of the court of appeals' decision in *Rodriguez*, 403 F.3d 952, and plaintiff's failure to show that the cumulative effect of the meals he missed put him at substantial risk of serious harm, it would be unfortunate if the Department of Corrections disregarded the expression of public opinion that the jury's verdict represents. It is evident that the jury found the institution's policy of using food to coerce behavior to be inhumane in an institution in which all inmates are deprived of most forms of sensory stimulation and many lack the mental or emotional wherewithal to make intelligent decisions. ORDER IT IS ORDERED that the motion of defendants Gerald Berge, Peter Huibregtse and Brad Hompe for judgment as a matter of law is GRANTED; the judgment entered herein on December 30, 2004 is VACATED and the clerk of court is directed to enter judgment for all defendants in all respects. FURTHER, IT IS ORDERED that plaintiff Berreli Freeman's motion relating to attorney fees is DENIED as moot.

Entered this 16th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed Dec. 1, 2004]

03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; and BRAD HOMPE, Unit Manager (former), in his individual capacity,

Defendants.

SPECIAL VERDICT LIABILITY

We, the jury, for our special verdict, do find as follows:

Question No. 1: Was plaintiff Berrell Freeman subjected to a serious deprivation of his basic need for food while he was confined at the Wisconsin Secure Program Facility between April 23, 2001 and October 12, 2003?

Answer: Yes

(Yes or No)

If you answered "Yes" to Question 1, proceed to Question 2. If you answered "No" to Question 1, proceed no further.

Question No. 2: Did any one or more of the defendants act or fail to act with deliberate indifference or reckless disre-

gard of the inhumane conditions of confinement complained of by plaintiff Freeman?

Answer:

Gerald A. Berge Yes
(Yes or No)

Peter Huibregtse Yes
(Yes or No)

Gary Boughton No
(Yes or No)

Brad Hompe Yes
(Yes or No)

/s/ Vicki McHone
Presiding Juror

Madison, Wisconsin

Dated this 1 day of December, 2004.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

[Filed Dec. 1, 2004]

03-C-0021-C

BERRELL FREEMAN,

Plaintiff,

v.

GERALD BERGE, Warden, in his official and individual capacities; PETER HUIBREGTSE, Deputy Warden, in his individual capacity; GARY BOUGHTON, Security Director, in his individual capacity; and BRAD HOMPE, Unit Manager (former), in his individual capacity,

Defendants.

SPECIAL VERDICT DAMAGES

We, the jury, for our special verdict, do find as follows:

Question No. 1: Did plaintiff Berrell Freeman suffer any physical injury from the action or inaction of any one or more of the defendants?

Answer: Yes

(Yes or No)

If you answered "Yes" to Question 1, proceed to Question 2. If you answered "No" to Question 1, proceed to Question 3.

Question No. 2: What sum of money, if any, would fairly and reasonably compensate the plaintiff Berrell Freeman for his injuries?

Answer: $ 50,000

Answer Question 3 only if you answered "yes" to Question No. 1.

Question No. 3: For those defendants that you found were aware of and deliberately indifferent to the inhumane conditions of confinement complained of by plaintiff Berrell Freeman, what sum of money, if any, should be awarded to plaintiff in order to punish the defendants for their conduct and to deter the defendants from engaging in similar conduct in the future?

Answer:

Gerald A. Berge $ 400,000

Peter Huibregtse $ 400,000

Brad Hompe $ 400,000

/s/ Vicki McHone
Presiding Juror

Madison, Wisconsin

Dated this 1 day of December, 2004.

APPENDIX F

JURY INSTRUCTIONS

[Filed Dec. 1, 2004]

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow *all* of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of two questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

The Eighth Amendment to the United States Constitution provides that no cruel and unusual punishment may be inflicted. Plaintiff Berrell Freeman is an inmate at the Wisconsin Secure Program Facility. Plaintiff Freeman claims that the defendants denied him his Eighth Amendment rights by implementing a policy that resulted in Mr. Freeman's being denied meals between April 23, 2001 and October 12, 2003. The defendants deny that they deprived plaintiff Freeman of his rights under the Eighth Amendment.

The problems that arise in the day-to-day operation of a correctional facility are not susceptible to easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. However, the Eighth Amendment imposes the duty on prison officials to provide humane conditions of confinement. Prison officials must ensure that inmates receive nutritionally adequate food, clothing, shelter and medical care.

Question number 1 asks whether plaintiff Freeman was subjected to a serious deprivation of his basic need for food while he was confined at the Wisconsin Secure Program Facility between April 23, 2001 and October 12, 2003. It is not enough that the conditions plaintiff Freeman complains of were restrictive or even harsh; this is part of the penalty that criminal offenders must pay. To answer the question "Yes," you must find that plaintiff was deprived of one of the minimal civilized measure of life's necessities. The test is an objective one. In applying it, you should be guided by society's contemporary standards of decency.

Question number 2 asks whether the defendants acted or failed to act with deliberate indifference or reckless disregard of the conditions of confinement complained of by plaintiff Freeman. To answer "Yes" as to any defendant, you must find that the defendant was personally responsible for the

deprivation of nutritionally adequate food, resulting is a substantial risk of harm to plaintiff. The personal responsibility requirement is satisfied if the conduct causing the deprivation occurred at the defendant's direction or with the defendant's knowledge and consent. That is, he must have known about the conduct and facilitated it, approved it, condoned it, or turned a blind eye. The personal involvement requirement may also be satisfied by those responsible for creating policies, practices and customs that caused the deprivation.

Deliberate indifference is established only if there is actual knowledge that plaintiff Freeman was not receiving nutritionally adequate food and if the defendants disregarded that fact by intentionally refusing or failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference. To act "deliberately" means to act intentionally; that is, knowingly and voluntarily and not because of mistake or accident.

Acts are reckless when they represent a gross departure from ordinary care in a situation where a high degree of danger is apparent. If any one of the defendants was in a position in which he certainly should have known that his conduct would violate plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then he acted with reckless disregard for the plaintiff's rights.

You have heard evidence that certain witnesses have been convicted of crimes. Evidence of a witness's prior conviction of a crime may be considered by you only insofar as it may affect the credibility of the witness. You may use that evidence only to help you decide whether to believe that witness and how much weight to give that witness's testimony.

The burden of proof rests upon the party contending that the answer to a question should be "Yes." This burden is to satisfy you, to a reasonable certainty, by the preponderance or

greater weight of the credible evidence, that "Yes" should be the answer.

By the preponderance of the evidence is meant evidence which when weighed against that opposed to it has more convincing power. Credible evidence is evidence that is worthy of belief in the light of reason and common sense.

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration.

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room. Once you are there, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree. When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the court.

Supreme Court, U.S.
FILED
JUL 13 2006
OFFICE OF THE CLERK

(21)

No. 05-1641

In The

Supreme Court of the United States

BERRELL FREEMAN,

Petitioner,

v.

GERALD A. BERGE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Petitioner, a Wisconsin prisoner, refused to comply with prison rules for receiving food service, such as the rule to wear pants when a meal is served. Since the prisoner refused to put on his pants, food was withheld.

The question is whether the court of appeals erred in concluding that petitioner failed to present sufficient evidence to justify a verdict (a) that the prisoner sustained a substantial risk of serious physical harm or (b) that respondents, prison officials, were deliberately indifferent to the prisoner's condition?

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No. 05-1641

In The

Supreme Court of the United States

BERRELL FREEMAN,

Petitioner,

v.

GERALD A. BERGE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

STATEMENT OF THE CASE

Berrell Freeman is a 35-year old Wisconsin prisoner serving a 58-year sentence for armed robbery, attempted homicide, burglary, and theft with a firearm. (Tr. IA 16) He is at the high-security Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin. He brought this civil rights action for claimed damages resulting from his missing meals over a two-and-a-half year period, from April 23, 2001, to October 12, 2003. (Tr. IIB 66)

It is not as though the prison did not offer food. It did. But WSPF had dinner rules. The main one involved in this case required inmates to wear pants at the time of meal delivery. Freeman refused to wear pants. "They wanted me to put pants on. Fuck that. I ain't putting my pants on. Give me my food, man." (Tr. IA 41.) "I break rules. I admit this. I break rules all the time." (Tr. IA 40.) "[S]ometimes I follow orders. Sometimes I don't." (Tr. IA 53.)

So food was brought to his cell but, if he was not wearing pants, it was not delivered. From WSPF's point of view, he refused by not complying with the pants rule. From Freeman's point of view, he was denied food. However, Freeman agrees that for all the food "denials" enumerated in his complaint, ex. 501, he was fully aware of the rule that in order to be fed he was required to wear pants, but deliberately and knowingly violated the rule. (Tr. IA 70-78.)

Under prison policy, withholding food is permissible only for food-related behavior. It cannot be used as punishment for misbehavior generally. (Tr. IB 71, 75, 91.)

Unit manager Bradley Hompe explained that withholding meals under the meal delivery policy was not punishment; it's a refusal to be served. "If I didn't wear my pants at McDonald's, they wouldn't give me a cheeseburger." (Tr. IB 54.) The inmate only is told what he must do to be fed. (Tr. IB 70.) It is the same as when they do not put in a request to get a library book: they will not get the book. (Tr. IB 71.)

Security Director Gary Boughton put it this way. "I'm not refusing him his meal. I'm there to provide it to him. I'm giving him the opportunity to take it." (Tr. IB 92.) "Staff are there to provide the food to the inmate. They're there three times a day, 365 days a year. Inmates know the

rule. All they have to do is have trousers or shorts on." (Tr. IB 93.)

There are established protocols for dealing with non-eating inmates. Cell Unit Manager Hompe explained that the inmate is monitored to insure that he does not put himself at extreme levels of danger that may cause starvation. If an inmate misses meals for three consecutive days, or nine consecutive meals, they bring in the doctors and nurses. (Tr. IB 60.)

Dr. Linda Farley, Freeman's medical expert, noted the significance of Freeman's drinking water while not eating. "Actually a person can go several weeks – have been known to go several weeks without food, as long as they get water." (Tr. IIB 14.) Regarding WSPF's intervention protocol after three consecutive days of not eating, Dr. Farley said she "would not expect to see a significant health risk for somebody who has gone three days ... not eating but drinking." (Tr. IIB 30.) Of equal importance is that Dr. Farley concluded that Freeman was "not depriving himself of food for any great length of time until" October of 2003. (Tr. IIB 24.) WSPF medical staff intervened at that time. (TR. IIB 46-50)

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION

A. The Decision Does Not Conflict With This Court's Holdings.

1. Freeman was daily offered food under rules with which he easily could have complied.

Freeman's petition raises a point of law that no one disputes, and he does not connect it to the facts of the case.

Everyone agrees – the district court, the court of appeals, and respondents – that prisons must provide prisoners with nutritious food. The uncontradicted fact in this record is that the prison brought a meal to Freeman's cell three times a day, seven days a week. Security Director Boughton explained: "Staff are there to provide the food to the inmate. They're there three times a day, 365 days a year. Inmates know the rule. All they have to do is have trousers or shorts on." (Tr. IB 93.) But since Freeman refused to comply with the rules for meal service, he was treated as having refused his meals.

The food service rules Freeman defied are eminently reasonable. He refused to put his pants on, sometimes would not stand mid-cell with lights on, would wear a sock around his head, and, on one occasion, failed to clean the blood and feces he had smeared on the walls of his cell. Petitioner's Appendix ("Apdx") 13a. The district court explained that these rules could be justified as designed to "decrease

incidents of sexual exhibitionism, safety (standing in mid-cell with the lights on protects the officers who are setting food trays on the trap, as does not being able to wear a sock around one's head to hide a potential weapon), health and cleanliness." *Id.*

The court of appeals likewise agreed with the reasonableness of the rules. Citing respondents' counsel's opening statement, "[T]here are a lot of women security officers working in this facility so they are entitled to basic privacy." Apdx 3a. Further, there are security issues such as "[i]nmates throw urine, feces, expose themselves, ejaculate, and to prevent that from happening to any security officer, there is a rule that the inmate must be clothed." *Id.* Additionally, the court of appeals observed that the sock "posed a potential threat to the guards" and the blood and feces raised the possibility of food contamination. *Id.*[1]

Critically, the court of appeals noted that Freeman "could readily have complied with" these rules, and "he offers no excuse for his non-compliance." Apdx. 3a. Freeman's problems were "self-inflicted." *Id.* 7a. Even here, Freeman effectively concedes the validity of the rules. He offers this Court no excuse for his obstinacy.

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[1] The court agreed that an inmate's being asleep at mealtime would not justify a refusal to feed (depending on whether the guards had reason to fear his reaction to being awakened or could not be awakened), "[b]ut Freeman failed to show how many of his missed meals were missed for reasons that cannot be easily related to the refusal to comply with a reasonable condition on the receipt of food," with an exception that did not rise to the level of a violation. Apdx 3a.

2. Freeman failed to produce evidence that his self-inflicted hunger subjected him to a substantial risk of serious harm. The prison intervened before that happened.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." *See generally, Estelle v. Gamble*, 429 U.S. 97 (1976). There are two elements to an Eighth Amendment claim. One is objective. It asks, "was the deprivation sufficiently serious?" *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). The second is subjective. It asks, "did the officials act with a sufficiently culpable state of mind?" *Id.* A plaintiff must prove up both components. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Wilson v. Seiter*, *id.* at 301, n.2.

Under the objective test, the plaintiff must be subjected to "a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Freeman fails to deal with the testimony. As captured by the district court,

- He adduced no evidence that before October 2003 he had ever been denied more than nine meals in succession, "so as to trigger the institution's policy of bringing in a doctor and nurse to assess an inmate's health status," Apdx 16a;
- He admitted that "nurses started visiting him in October, which is when he missed nine consecutive meals," *id*;
- He continued to drink water even when he missed meals, *id*;

- He saw nurses during the periods when he was not receiving every meal, *id*;
- Dr. Linda Farley, his own expert, testified that his lack of food could have caused him headaches, dizziness, muscle weakness, inability to stand for long periods of time and difficulty breathing and talking "but she did not identify these particular consequences as serious physical harm," *id;*
- Dr. Farley testified "that so long as plaintiff was drinking water, he could go without food for several weeks before experiencing organ failure," *id*;
- Dr. Farley testified that starvation, or organ failure, would be the end of a continuum of physical harm that individuals suffer as a result of lack of food and that "nothing in plaintiff's medical records showed that he had come anywhere near the point of organ failure," *id;*
- Dr. Farley testified that "she would not expect to see a significant health risk where an individual goes three days without eating but continues to drink liquids," *id.* 17a;
- Dr. Farley observed from the records that "on several occasions a Dr. Maier had ordered a high caloric, high protein diet for plaintiff when he was losing weight and that the diet orders were carried out," *id.*;
- "There was no evidence that any of his physical problems amounted to serious harm," *id.*

The court of appeals likewise observed that, although Freeman twice did not receive a timely medical inspection after missing nine consecutive meals, nevertheless "there is no indication that his life or health was jeopardized." Apdx 7a.

3. The prison officials aggressively dealt with his condition. They were not deliberately indifferent.

This Court set forth the subjective standard in prison conditions cases in *Farmer v. Brennan*, 511 U.S. 825 (1994). Distinguishing the higher *mens rea* element for excessive force cases, which requires purposeful infliction of harm, *id.* at 835-36, the Court held that "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.* at 836. More specifically, the Court said:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837.

The district court cited the numerous efforts to deal with Freeman's recalcitrance and its health consequences.

- In October 2003 the institution initiated its hunger strike protocol, and "nurses began monitoring plaintiff, giving him information about the risks of not eating and assessing his vital signs," Apdx 17a;

- Under this protocol, "the nurses would have had a doctor see him and they could have taken additional steps to assess his condition, such as weighing him and drawing blood for analysis," *id*;
- The protocol called for "an incident report" with notice going "to the health services unit, clinical services, the unit manager and the security director," *id.*;
- At that point, the inmate is placed on a monitoring program "and both the sergeant and the unit manager talk to the inmate to try to find out why he is refusing meals," *id;*
- Then, a "multidisciplinary meeting is held to discuss the inmate ... to make sure that the inmate is being monitored and the doctor is assessing him," *id.*;
- In some cases, "the institution will notify lawyers and obtain a court order for forced feeding or hydration," *id.*

As to the fact, at least according to Freeman's testimony, that he twice passed beyond the nine-consecutive meal rule, there is no evidence that any named defendant knew about it. As the court of appeals said, "[T]here is no evidence that the defendants knew that he was endangering his health sufficiently to require drastic intervention." Apdx 7a. "He was visited by nurses who confirmed that he was taking water ... and he was visited by a doctor as well though at some point he began refusing to see the doctor." *Id.*

The court of appeals also identified the enormously practical problems prisons face with such a deliberately disobedient inmate. To counsel's suggestion that he be placed in segregation for his misconduct, the court observed

that he already ***was*** in segregation; that is why food service was being brought to his cell. Apdx 4a. To the suggestion that he be denied good-time credits, the court observed that with a 58-year sentence and his "propensity for obstreperous behavior, it is unlikely that a denial of good-time credits will inflict significant disutility on him." *Id.* Denying privileges would not work because "he has been denied privileges, without the denial having deterred him from continuing to violate the food rule." *Id* In short, the arguments failed to note "the practical limitations of prison discipline as a means of maintaining an orderly environment." *Id.* Freeman had pointed to "no alternatives that would have been more efficacious." *Id.* What is a prison to do with this fellow?

4. The court of appeals followed this Court's holdings.

It is clear, contrary to Freeman's suggestion, that the court of appeals did not relieve prison officials from responding to substantial risks of serious harm. It said, a prison cannot "allow a prisoner to starve himself to death, or even starve himself to the point at which he seriously impairs his health." Apdx 4a-5a. It well might be that the prison must "force-feed the prisoner to prevent him from seriously endangering his health." Apdx 5a. Other situations requiring prison intervention arise when the underlying behavior is suicidal or insanity-based. *Id.* The court decidedly did not license prison indifference.

The Eighth Amendment is designed to protect prisoners who cannot help themselves. "[A] prison official's duty to protect an inmate from harm arises because the state has placed him 'under a regime that incapacitates [him] to exercise ordinary responsibility for his own welfare.'" *Christopher v. Buss*, 384 F.3d 879, 883 (7th Cir. 2004)

(quoting from *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998)). Therefore, a bump in the ground on a prison baseball field did not violate the Eighth Amendment, even though it caused an injury, because the inmate was in a position to exercise caution to protect himself. *Christopher v. Buss, id.* The Eighth Amendment does not aid an inmate who deprives himself despite having full control of the situation.

Freeman would use the Eighth Amendment as a sword to subvert reasonable rules for an orderly institution. As the Seventh Circuit stated in a factually very similar case,

> A prisoner cannot force the prison to change its rules by going on a hunger strike and blaming the prison for his resulting loss of weight. ... He cannot, in short, be permitted to engineer an Eighth Amendment violation. ... The analogy is to civil contempt. A person who is imprisoned for refusing to sign a deed that he is legally obligated to sign, but who can get out of prison just by singing it, cannot complain that he is being punished. ... It is the same here.

Rodriguez v. Briley, 403 F.3d 952, 953 (7th Cir. 2005) (internal citations omitted).

In sum, neither the respondents nor the court of appeals ignored the respondents' duty to protect an inmate from the risk of serious harm. Neither ignored the duty to provide inmates with nutritious food. Nor did they ignore the duty to defer to jury verdicts where there is evidence to support them. Here, there was no evidence of serious harm. There was no evidence of deliberate indifference.

B. The Seventh Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

Freeman's petition does not cite another circuit decision on all fours. He cites decisions at the pleading stage. At the pleading stage complaints must be liberally construed to enable a plaintiff to develop a set of facts to support a recovery. The court may dismiss a complaint for failure to state a claim only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Freeman had the full benefit of these rules. In fact, the district court denied respondents' motion for summary judgment because it "was undisputed for the purpose of summary judgment ... that he had been denied food repeatedly for periods lasing several days or longer." Apdx 14a. Freeman's problem is not that the courts did not apply these liberal rules to enable him to prove his case with competent evidence. His problem is that he lacked sufficient evidence both as to the element of serious harm and as to the element of deliberate indifference.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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